

6-1-2009

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Recommended Citation

Stephan, Paul B. (2009) "Symmetry and Selectivity: What Happens in International Law When the World Changes," *Chicago Journal of International Law*. Vol. 10: No. 1, Article 6.

Available at: <https://chicagounbound.uchicago.edu/cjil/vol10/iss1/6>

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Symmetry and Selectivity: What Happens in International Law When the World Changes

Paul B. Stephan*

I. INTRODUCTION

This Article has a simple hypothesis: selectivity in international law increases as international relations become more symmetrical. Conversely, international law becomes more universal as asymmetry grows. This relationship holds true during the modern period. Its existence in turn supports the theoretical claim that the content of international law reflects the rational interests of those actors that make it.

Consider first international relations. A simple narrative, seriously incomplete but good enough for present purposes, would go something like this: from the end of World War II to the collapse of the Soviet empire, a bipolar superpower competition dominated international relations. There followed a period of US hegemony, but more recently significant Chinese, European, Indian and Russian challenges to the United States have complicated that structure. The details do not matter, nor do the dates, the extent of US hegemony when it existed, the number of the new great powers, or the precise relative influence of each. What matters is that the basic structure of international relations underwent a transformation in the latter part of the twentieth century and now appears to have changed again.

Next, consider competing trends in claims about international law, one toward universality and one toward selectivity. Universal international law applies equally to all states. Selective international law means that states vary in

* Lewis F. Powell, Jr. Professor and Elizabeth D. and Richard A. Merrill Research Professor, University of Virginia School of Law. I am indebted to comments and criticism by Daphne Barak-Erez, Eyal Benvenisti, Gabriella Blum, Curtis Bradley, Pamela Clark, Kristina Daugirdas, Jack Goldsmith, Allen Lynch, Pierre-Hugues Verdier, Brantly Womack and workshop participants at the Radzyner School of Law, Interdisciplinary Center Herzliya and the Haifa University School of Law. Eyal Benvenisti also made available invaluable research on Chinese approaches to international law and Rajat Rana gave me access to his extensive research on Indian judicial opinions enforcing international law. Only I am responsible for my errors and misjudgments.

what rights and obligations they recognize as well as how to allow them to be enforced. In the extreme case of selectivity, the content of international law and its enforcement depends entirely on the identity of the state in question. If the recognition of international law reflects the rational interests of states, then international law should trend toward universality during times of hegemony and toward selectivity during periods of multipolar great power competition. Conversely, if international law does not conform to this pattern, then something other than the rational interest of states must explain its content. Much more is going on, of course, but this simple hypothesis suffices to ground an inquiry into the nature of international law as a creature of, and dependent on, international relations.

Developments in international law since World War II are consistent with the claim that selectivity increases as international relations become more symmetrical. During the superpower rivalry, each side developed distinct rules for determining what counts as international law. Universalist international institutions existed but were largely sidelined. With the end of the Cold War came a flourishing of international institutions and more ambitious efforts to promote universal norms of international law. At some point during the last decade these trends have reversed, and epicenters of power have developed new mechanisms to select which international obligations they will recognize. In particular, the institutions of the European Community have aggressively pursued a dualist approach to international law that allows the European Court of Justice to pick and choose which international obligations it will honor.

The simple hypothesis of this Article has broad implications. Over the last few decades international relations specialists have debated whether the material interests of states dictate the form and substance of the international order, or instead whether constructions of social order based on beliefs and perceptions shape the interests that produce international structure. For roughly the last twenty years international lawyers have joined in the debate. As wordsmiths and constructors of ideas, lawyers have some sympathy with the constructivist agenda.¹ But at least a handful of legal academics discount the significance of

¹ As a crude empirical investigation, I ran searches in the Lexis database for US and Canadian law review articles for the string "constructivist and international w/1 law and international w/1 relations". On December 19, 2008, this search generated 303 results. By contrast, the string "rational w/1 choice and choice w/1 theory and international w/1 law and international w/1 relations" generated 195 results. This disparity is all the more remarkable if one considers that a proponent of constructivist approaches to international relations often will contrast this perspective to rational choice theory. For an effort by a prominent international lawyer to synthesize the constructivist project with mainstream international relations theory, see Anne-Marie Slaughter, *International Law and International Relations Theory: A Prospectus*, in Eyal Benvenisti and Moshe Hirsch, eds, *The Impact of International Law on International Cooperation: Theoretical Perspectives* 32–39 (Cambridge 2004).

international law as an agent for transforming state preferences and instead trace the evolution and transformation of international law to changes in tangible state interests, most importantly, security and material well being.² The tension between these two approaches will fuel debates among international lawyers for the foreseeable future.³

This Article's truncated review of international relations and international law over the last sixty years illuminates these debates. It isolates symmetry and asymmetry in international relations, on the one hand, and selectivity and universality in international law recognition, on the other hand, to demonstrate a link between the two fields. When the core structures of international relations change, so do the patterns for creating and recognizing international legal obligations. A clear link exists between both kinds of changes, and the nature of the link conforms to what states rationally should want in light of their material interests.

This Article proceeds in four sections. First, it develops an informal model of asymmetry in interstate relations that assumes rational state actors and iterative interactions among these actors. It then expands on the features of universal and selective international law and explains why conditions of asymmetry tend to induce states toward universalist claims, and why symmetrical relations promote selectivity. It reviews the evidence about changes in the structure of international law since World War II to demonstrate that the predicted effect exists, and then concludes with an agenda for further research.

II. SYMMETRY AND ASYMMETRY IN INTERNATIONAL RELATIONS

Think of the relationship of a great power and a small adjoining state, say the Russian Federation and Georgia or the United States and Cuba. Within either pair, the states differ greatly in terms of land mass, population, size of the economy, diversity of natural resources, capability to exert military force, diplomatic resources, nature of their public civil institutions, and cultural and ethnic variation within the population. These differences in turn can affect their relations. The powerful state might use its economic and military power to

² For recent works by legal scholars in this tradition, consider Andrew T. Guzman, *How International Law Works: A Rational Choice Theory* (Oxford 2008); Joel P. Trachtman, *The Economic Structure of International Law* (Harvard 2008); Robert E. Scott and Paul B. Stephan, *The Limits of Leviathan: Contract Theory and the Enforcement of International Law* (Cambridge 2006); Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford 2005); Andrew Eyal Benvenisti, *Sharing Transboundary Resources: International Law and Optimal Resource Use* (Cambridge 2002).

³ I do not mean to imply that all international lawyers see the need to link their research to a theory about international relations. For many, perhaps most, a teleological approach tied to some set of normative preferences seems to suffice.

impose obligations on the weaker state. In the extreme case, the powerful state might seize all the weaker state's resources. Less radically, the more powerful state might demand an uneven distribution of rents from the two states' joint undertakings.

These aspects of bilateral power relations are well studied.⁴ Asymmetry, however, extends into other domains. A fundamental, indeed defining, aspect of great power status is the existence of multiple significant relationships with other states. States other than great powers, by contrast, have meaningful relations with a smaller set of state counterparties. Russia's ties to Cuba and Venezuela matter, in part because of their secondary effect on the United States, but also because they provide a template for Russia's relations with other Western Hemisphere states. Georgia's relationships with Cuba and Venezuela, by contrast, matter to few.

The point can be generalized. Lawyers attach importance to precedent, the idea that past actions help to predict future ones. If one can assume that interested third-party observers derive valuable information from observing the actions of states, then the relationship between a great power and a small state creates an asymmetry in the way this information is understood.⁵ A wide audience will attach meaning to the actions of a great power, and the great power in turn will take this audience's responses into account when deciding what to do. The actions of the small power, followed by a reduced audience, will have less significance and hence, less importance. The small power will concentrate on the expected reaction of the great power to its contemplated choices and discount the possibility that other states will react. The small power, before undertaking any internationally significant action, will ask, "What will the great power believe I meant by this?" The great power, contemplating similar action, instead will ask, "What will the world believe I meant by this?"

To use a concrete example, imagine that a private person seeks to bring a lawsuit in a US court against a small state's wholly owned enterprise. Today the question of immunity from suit rests on a statute, but until 1976 the US government had unreviewable discretion to permit such suits to proceed or not. After 1952 the government sought to develop a consistent line between commercial and public activities to justify commercial lawsuits against a state-owned enterprise. How it applied this distinction and whether to use it at all

⁴ The outstanding work remains Brantly Womack, *China and Vietnam: The Politics of Asymmetry* (Cambridge 2006), especially chapters 4 and 11. I am indebted to Professor Womack for drawing my attention to asymmetry as a distinct and enduring aspect of international relations.

⁵ On the assumption that third-party observations motivate and constrain international relations, see Scott and Stephan, *The Limits of Leviathan* at 17–20 (cited in note 2).

rested on discretion, not law. Assuming that pre-1976 law still applied, what should the US government do with our hypothetical lawsuit?

Presumably, a distinction between commercial and public activities benefits US interests. Given the relatively lesser role of government ownership in the US economy, partial relaxation of sovereign immunity increases judicial access for US businesses with claims against foreign states without exposing the United States to significantly greater litigation risk either at home or abroad. For a small state, however, immunity can be essential. It may find litigation in the United States unaffordable and might have to cease operating in its most lucrative market if not granted freedom from lawsuits. Because its courts may see very few claims against foreign states, the small state does not need to develop a coherent doctrine of foreign sovereign immunity. But the United States cannot intervene in the lawsuit without considering the impact of its intervention on similar suits. Even if the defendant state were to offer an extraordinary concession (for example, surrender of a fugitive not reachable through the normal extradition process), the United States would hesitate before supporting the request for immunity.⁶

Generalizing again, each interaction between the large and small states has consequences for the large state that do not exist for the small one. The consequence might be positive: a harsh action against the weak state might signal the great power's capacity and commitment to advance its interests. Only the great power can do something *pour encourager les autres*. The consequence instead could be negative: a concession to one small state might invite others to press their demands on the great power. Conceding sovereign immunity in one case may induce other states to demand similar protection. There may be no component within the great power's government that enjoys sufficient trust to exercise the authority to pick and choose among applicants.

In a no-transaction-cost world of Coasean bargaining, the great power and the small state have some capacity to negotiate around this problem through side payments.⁷ In my sovereign immunity example, the small state could surrender to the great power a fugitive that otherwise might escape its grasp. But even Coasean bargaining will not produce outcomes that always satisfy both parties in an asymmetrical relationship.

First consider a measure that will generate a negative consequence for the great power. Disregarding the line between commercial and noncommercial disputes when invoking foreign sovereign immunity, for example, might harm the United States by closing its courts to US claimants injured by the commercial

⁶ The hypothetical is loosely based on *Rich v Naviera Vacuba, SA*, 295 F2d 24 (4th Cir 1961).

⁷ See Ronald J. Coase, *The Problem of Social Cost*, 3 J L & Econ 1 (1960).

breaches of foreign companies. The size of this indirect cost might exceed the positive value of the transaction under consideration, in which case the small state could not pay the great power enough to go ahead. Even where this condition does not apply, the small state may face hard budget constraints that limit its ability to pay compensation. In either case, the great power will refuse to do something that the small state wants, and which may have only small direct costs for the great power.

Next, consider the alternative problem of a measure that will generate a positive consequence for the great power. The US-led move away from the absolute theory of sovereign immunity, for example, was thought to benefit US firms with potential commercial claims against foreign states more than it cost the United States by opening it up to litigation risk. The great power has an incentive to undertake such a step even if it imposes substantial costs on the small power (say, a state that cannot afford to litigate in US courts). The small power might seek to pay the great power not to undertake the measure, but the same analysis considered above should apply. If the size of the positive consequence (plus the direct benefit to the great power) is greater than the harm inflicted on the small state, the small state would be irrational to pay the great power enough not to act. Even if a rational price existed for the great power's inaction, a budget constraint might deter the small state from paying it.

Further complicating this relationship are possible information asymmetries with respect to the consequences facing the great power. The small state may find it hard to estimate the great power's cost-benefit calculus regarding the precedential impact of any particular action. It can only guess at the array of relationships between the great power and other states that an action might affect. As a result, the small state will have difficulty detecting bluffs by the great power. A sufficiently iterative relationship between the two states might ameliorate this obstacle, but changes in regime in either state, if frequent enough, would diminish the learning value of these iterations.⁸ Regime stability is an important, if not necessarily essential, prerequisite for the attainment of great power status. It is likely, however, that small states change regimes more frequently than great powers.⁹ Accordingly, discontinuities in regimes may reduce the learning value from iteration that an ongoing relationship might otherwise produce.

These conjectures about asymmetry in international relations have critical implications for international law. It is conventional to assume that states make

⁸ On the impact of regime changes on rational choice models of state behavior, see Scott and Stephan, *The Limits of Leviathan* at 44, 56–58 (cited in note 2).

⁹ See Womack, *China and Vietnam* at 83 (predicting that small states will better coordinate their interactions with a great power but will change their policies more often) (cited in note 4).

rational choices and that a state's claims about international law further reflect this rationality.¹⁰ Rationality refers not to a process of deliberation, but rather to adaptive fitness. State choices either advance the interests of the state (even if decisionmakers do not understand how or why), or they do not. In the former case, decisionmakers will have further opportunities to make more choices; in the latter, they will not. From this perspective, claims about international law also should advance state interests or die out.

One might believe that international law, to the extent it functions as a constraint on state behavior, should wane as state power waxes, and disappear as a great power approaches absolute hegemony. On reflection, however, it seems plausible that even a great power may see its interests served by submitting to legal restraints. Because a large international audience attends its actions, a great power should contemplate a range of measures that it can adopt or to which it can adhere regardless of the particular cost-benefit analysis of specific transactions. Ascribing these measures to legality, rather than to *raison d'état*, has certain advantages. First, a great power might want to make provisions against an uncertain future when its power faces substantial limits. In such a case, it would accept a present constraint if that choice increased the likelihood that its future adversaries might be similarly bound. Whether this occurs in the real world is debatable. Second, legal rules lower the transaction costs of international cooperation, and the benefits of at least some kinds of cooperation may exceed the cost to the great power of reducing its discretion. For example, claiming that a measure is legally required, rather than just likely, has signaling value.¹¹ It implies that the array of enforcement mechanisms might extend beyond the conventional mechanisms of retaliation to some kind of third-party dispute resolution process. Moreover, the claim may change the reputational stakes associated with the measure by associating compliance and noncompliance with a more general reputation for honoring legal obligations.¹² Third, states are complex organizations that need legal rules to minimize the

¹⁰ For present purposes, put aside the important debates about the precise meaning and operational significance of rational choice as a model for international decisionmaking. For a discussion of rational choice models of international relations as well as alternative theories, see Scott and Stephan, *The Limits of Leviathan* at 52–56 (cited in note 2).

¹¹ On signaling theory, consider Joseph E. Stiglitz, *The Theory of "Screening," Education, and the Distribution of Income*, 65 Am Econ Rev 283 (1975); Michael Spence, *Time and Communication in Economic and Social Interaction*, 87 Q J Econ 651 (1973); George Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q J Econ 488 (1970).

¹² On reputation as a factor in international relations, see Guzman, *How International Law Works* at 71–111 (cited in note 2); Rachel Brewster, *Unpacking the State's Reputation* (SSRN 2008), available online at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1268322> (visited Apr 17, 2009); Scott and Stephan, *The Limits of Leviathan* at 17–18 (cited in note 2); George W. Downs and Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J Legal Studies S95 (2002).

transaction costs associated with implementing a coherent course of action. A great power in particular needs ways of imposing discipline on its various components. Legalization of its position may help a great power to solve a domestic coordination problem by forcing its disparate policymakers to focus on a particular benchmark. It also might constrain future governments of that state, locking them in to a particular strategy.¹³

Consider, for example, a great power that faces no direct military threat but confronts disruptive guerilla tactics in theaters where it exerts influence. Such a power would have a strong practical interest in stigmatizing acts of violence by adversaries who do not operate openly, with a conventional command structure and in a manner that designates persons who wield force.¹⁴ Beside capturing and killing these opponents, the great power might characterize their status as that of unlawful combatants under the international law of armed conflict.¹⁵ This characterization would indicate to other states that offering assistance to such groups invites a range of sanctions, including perhaps armed reprisals, and to interested individuals that supporting such groups will result in unhappy consequences. Such a characterization also would enable the great power to mobilize its legal resources, including its military justice system, to inflict costs on the designated groups and their supporters. It also would constrain other branches of the great power's government, such as the clandestine services, that might otherwise seek to support informal combatants in other theaters where the great power has not yet extended its influence.

A state's claim that the status of "unlawful combatant" is part of the law of war may prove beneficial even if it adopts this position unilaterally.¹⁶ The

¹³ For a discussion as to why a powerful state rationally might choose legalization over discretion, see Rachel Brewster, *Rule-Based Dispute Resolution in International Trade Law*, 92 Va L Rev 251 (2006). The political science literature on legalization in international relations touches on some but not all of these considerations. See Kenneth W. Abbot and Duncan Snidal, *Hard and Soft Law in International Governance*, in Judith L. Goldstein et al, eds, *Legalization and World Politics* 37 (MIT 2001).

¹⁴ See Geneva Convention Relative to the Treatment of Prisoners of War (1949), art 4(a)(2), 6 UST 3316 (1956) (defining persons entitled to treatment of prisoners of war during international armed conflicts).

¹⁵ Military Commissions Act of 2006, Pub L No 109-366, § 3(a)(1), 120 Stat 2600, 2601 (enacting definition of unlawful combatant at 10 USC § 948a(1)(A)). See also *Al-Marri v Pucciarelli*, 534 F3d 213, 285, 318 (4th Cir 2008) (Williams concurring in part, dissenting in part) (Wilkinson concurring in part, dissenting in part), vacated and remanded as moot, *Al-Marri v Spagone*, 129 S Ct 1545 (2009); *Hamdi v Rumsfeld*, 542 US 507, 518 (2004) (plurality opinion) (recognizing status of unlawful combatant); *Ex parte Quirin*, 317 US 1, 30–31 (1942) (recognizing status of unlawful combatant).

¹⁶ The US position is lonely, if not unique. The Israeli Supreme Court, for example, characterizes as civilians, and not as combatants, persons who are not part of a militia recognized as such within the terms of the Geneva Convention. At the same time, that court recognizes the lawfulness of

assertion that armed attacks by informal groups fall into this category provides valuable information to interested observers. It also constrains the disparate actors within the great power's government regardless of the views of other states. When the United States invokes the international law of war, for example, it puts into play its military justice system (including military commissions that are somewhat less formal than a conventional courts martial) as a potential enforcement mechanism. The emergence of an international consensus would further benefit the great power by increasing the likelihood that other states will cooperate with its efforts to suppress informal militias. But such cooperation, although desired by the great power, is unnecessary for the claim to have value.

To summarize, a great power's extensive relations with multiple states make it likely that these relations will generate recurrent problems. Further, a great power has an interest in consistent resolution of such problems. As a result, a great power has a stronger incentive than other states have to declare certain resolutions of those problems as obligatory under international law. Such declarations have value independent of their acceptance as valid by other states. Characterizing a desired outcome as the product of international law indicates to other states what the great power's expectations will be, even if other states dissent. Such a characterization also might allow the great power to solve a domestic political problem, such as putting into play resources that it has dedicated specifically to international law enforcement.

One can conclude, then, that articulating and submitting to norms of international law is not inherently inconsistent with great power status. The issue becomes one of predicting the form that international law might take. In particular, it becomes possible to speculate when a great power will join, and thereby submit to the rules of, an international organization.

Membership in an international organization that imposes obligations on its members can generate substantial benefits. Such organizations can provide expertise in specialized areas. Perhaps more importantly, they can coordinate

some uses of force to prevent such civilians from carrying out armed attacks, even though the international law of armed conflict generally prohibits the deliberate targeting of civilians. See *Public Committee Against Torture in Israel v Government of Israel*, HCJ 769/02 (Dec 11, 2005). The Special Rapporteur for the UN Human Rights Council, a European international law professor, rejects the concept of unlawful combatant categorically and insists that "there are no circumstances in which the targeting of any other person [than a combatant directly participating in hostilities] can be justified." Martin Scheinin, *Mission to the United States of America*, A/HRC/6/17/Add.3, 20 (2007), available online at <<http://daccessdds.un.org/doc/UNDOC/GEN/G07/149/55/PDF/G0714955.pdf>> (visited Apr 17, 2009). For a defense of the US view in the face of these objections, see John B. Bellinger III, *Unlawful enemy combatants*, excerpted in Sally J. Cummins, ed, *Digest of United States Practice in International Law* 2007 911, 911–17 (Oxford 2008).

responses to particular problems in a manner that reinforces stability while permitting flexibility in the face of unexpected events.

Because membership in an international organization constrains as well as empowers, a great power probably will not join without reservations. Instead, a rational great power should seek to constrain organizations that stray too far from its purposes. A constraint might take the form of an *ex ante* restriction on the organization's capacities, or instead through rules that submit certain key actions to a vote for which the great power retains a veto.¹⁷ Control over membership also can limit the organization's capacities. A regional great power, for example, might join an organization whose members fall within its sphere of influence, while a universal hegemon might act through an organization comprising most states. In areas where the interests of great powers coincide, there might arise an international organization with universal membership but limited scope.¹⁸

Finally, consider a world with multiple great powers. Each great power would have numerous asymmetrical relationships with small states but symmetrical relations with each other. Further, assume that the great powers have some convergent interests but also have sharp disagreements in some areas. What would international law look like in such a world?

First, it seems plausible to assume that states with symmetrical relations and conflicting interests would be less likely to assert that a controversial measure, not already embodied in a formal legal agreement, rests on international law. The likelihood of disagreement and the even distribution of power would make such assertions futile, if not provocative, and to some extent might undermine similar assertions made in the context of asymmetrical relations. If, as I argue above, ascribing a preferred outcome to international law has value to a great power, then obviously empty ascriptions undermine that value. Cynicism about the meaningfulness of the international law label in one area may leak into others.

Second, it seems less likely that great powers would surrender to an international organization authority to resolve questions where they have opposing interests. As long as a great power would prefer to see an issue unresolved rather than have it go in an adversary great power's favor, it would block any mechanism that might lead to resolution by a body in which its adversary has a voice. It does not seem unreasonable to assume that a significant range of issues fall into this category. Consider, for example, the "frozen

¹⁷ See Paul B. Stephan, *Courts, Tribunals and Legal Unification—The Agency Problem*, 3 Chi J Int'l L 333, 335–37 (2002).

¹⁸ Consider Daniel W. Drezner, *All Politics is Global: Explaining International Regulatory Regimes* 63–88 (Princeton 2007).

conflicts” involving breakaway regions in states that once formed the Soviet Union.¹⁹ Unless and until the great powers agree on a unified solution to all these conflicts (say, no change in 1989 national boundaries without the consent of all concerned), deadlock seems preferable (from the perspective of the great powers, not that of the persons living in the affected regions) to a solution designed to satisfy no great power.

Third, the existence of competing great powers who are simultaneously regional hegemon can complicate this analysis. A regional hegemon might ascribe measures to international law and promote international organizations even in the face of another great power’s opposition, if these steps would promote regional coherence and solidarity. The value of signaling to states under its influence the quality of the hegemon’s commitment to a measure might outweigh the costs associated with rejection of the measure by the opposing coalition. Similarly, international organizations limited to states within the hegemon’s sphere of influence would bring expertise, commitment and flexibility to bear on a policy area and still remain under the hegemon’s ultimate control. As a result, even under conditions of symmetry we might see the growth of assertions of international law and international organizations, but on a regional rather than a universal basis.

To summarize, in a world where states act rationally and where the expression of international law reflects the choices of such states, great powers have an incentive to formulate their preferences as claims about international legal obligation and to delegate responsibility to address particular problems to international organizations over which they have effective control. Where multiple great powers coexist in a world of rational actors, we should expect conflicting claims about the content of international legal obligations and a more limited scope for international organizations. Claims about international law might develop universally, regionally, or unilaterally, depending on the configuration of power relations at any particular moment.

III. UNIVERSALITY AND SELECTIVITY IN INTERNATIONAL LAW

A naive observer of international law might believe that this body of legal commitments applies coherently and universally. One can find such aspirations

¹⁹ These conflicts, which vary in severity, include Transnistria in Moldova, Abkhazia and South Ossetia in Georgia, Nagorno-Karabakh in Azerbaijan, Chechnya in Russia, and Crimea in the Ukraine. Similar conflicts attended the breakup of Yugoslavia and, in the case of Kosovo, continue to fester. Consider Christopher J. Borgen, *Whose Public, Whose Order? Imperium, Region, and Normative Friction*, 32 Yale J Intl L 331 (2007); Christopher J. Borgen, *Imagining Sovereignty, Managing Secession: The Legal Geography of Eurasia’s “Frozen Conflicts”*, 9 Or Rev Intl L 477 (2007).

throughout the literature.²⁰ As a purely positive matter, however, many different international rules apply to the many states that make up the international system. Most obviously, states negotiate and join treaties selectively, with almost no single international agreement enjoying the formal assent of every state.²¹ The binding nature of a treaty depends on state consent, and universal consent to identical obligations is exceedingly rare. As a result, although many states may have some overlapping treaty obligations, few if any states in the contemporary world face exactly the same set of treaty commitments as any other state, and certainly no two great powers do.

Moreover, over the last century we have seen the rise of international organizations with independent lawmaking capability. These bodies, the creatures of treaties, sometimes take on adjudicatory form, sometimes a legislative one, and sometimes, as in the case of the European Community, exercise all the legal functions of a state. The exercise of this delegated authority adds another layer of complexity to the determination of international law and invites further selectivity by states in what rules they will recognize.²²

A state can deal with an international organization and the law it makes in several ways. It may simply stay outside the club, thereby withholding its consent to and support for the entire operation. The refusal of the US to join the International Criminal Court or ratify the Kyoto Protocol exemplifies such lawful if controversial selectivity. Alternatively, a state might join a club but refuse to respect some portion of the rules that the organization generates. A number of European constitutional courts, for example, have considered the prospect of rejecting rules generated by the institutions of the European Community in cases where those rules violate fundamental national law.²³

²⁰ See Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 Harv J Intl L 323, 323–25 (2008).

²¹ Id at 335–38, 345–46. Even when most or all states join the same treaty, the result may not be identical legal obligations. For example, almost every state has assented to the UN Charter, but no consensus exists about precisely what obligations that treaty entails.

²² See Scott and Stephan, *The Limits of Leviathan* at 43–47 (cited in note 2). Consider Andrew T. Guzman and Jennifer Landsidle, *The Myth of International Delegation*, 96 Cal L Rev 1693 (2008); Curtis A. Bradley and Judith G. Kelley, *The Concept of International Delegation*, 71 L & Contemp Probs 1 (2008); Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 U Ill L Rev 71; Kristina Daugirdas, *International Delegations and Administrative Law*, 66 Md L Rev 707 (2007); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 Colum L Rev 1492 (2004); Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 Stan L Rev 1557 (2003); Stephan, 3 Chi J Intl L 333 (cited in note 17); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 Minn L Rev 71 (2000).

²³ *Toburn v Sunderland City Council*, [2002] 1 CMLR 50, [2003] QB 151 (UK Q.B.); Conseil d'État, Ass, 30 Oct 1998, *Sarran et Levacher*, 1998 Lebon 368 (French Conseil d'État); Decision of 12 Oct 1993, *Re: Maastricht Treaty* BVerfGE 89, [1994] 1 CMLR 57 (1993) (German Constitutional Court);

Disregard of the decisions of the World Trade Organization's ("WTO") Appellate Body occurs regularly.²⁴ As I discuss in the next section, just in the last year the top judicial bodies in both the European Community and the US have asserted the authority to disregard the authoritative and conclusive orders of organs of the UN, namely the International Court of Justice ("ICJ") and the Security Council.²⁵

And then there is the thorny problem of customary international law. In theory, certain rules arising from state practice develop into universally binding custom, save for those rare states that persist in objecting to the rule.²⁶ Reality is much messier. States differ widely in the methods they employ for the recognition and interpretation of custom. Even when they invoke the same general principles of recognition and interpretation, they find sufficient leeway within the loose standards invoked by custom to reach profoundly different conclusions.

To add another layer of complexity, customary international law includes the rules of treaty interpretation. Although a multilateral convention on this subject exists, important powers, most especially the United States, have declined to join it.²⁷ As a result, not only do different treaties apply to different states, but differences in views as to the customary rules of treaty interpretation can lead to diverging legal obligations even when states have a treaty in common. Moreover, treaty enforcement mechanisms can diverge even when states recognize the same obligation, altering the practical effect of the shared rule.²⁸

SpA Fragn v Amministrazione delle Finanze, Dec 232 of 21 Apr 1989, 72 RDI 102 (Italian Constitutional Court).

²⁴ See Marco Bronckers, *From "Direct Effect" to "Muted Dialogue": Recent Developments in the European Courts' Case Law on the WTO and Beyond*, 11 J Int Econ L 885 (2008). For the most recent instance *FLAMM v Council*, Cases C-120/06, C-121/06, 2008 ECJ (Sep 9, 2008), available online at <<http://curia.europa.eu/en/transitpage.htm>> (visited Apr 17, 2009).

²⁵ *Medellin v Texas*, 128 S Ct 1346 (2008); *Kadi & Al Barakaat Intl Found v Council & Comm*, Joined Cases C-402/05, C-415/05, 3 CMLR 41 (2008).

²⁶ See Statute of the International Court of Justice (1945), art 38(1)(b), 59 Stat 1055, TS No 993 (authorizing the court to apply "international custom, as evidence of a general practice accepted as law"); Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987) ("Third Restatement") ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.").

²⁷ See Vienna Convention on the Law of Treaties (1969), 1155 UN Treaty Ser 331 (1980). The United States recognizes some, but not all, aspects of this Convention as binding custom. Consider Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 Va J Int L 281, 286 (1988). Other nonparties include France, India, Israel, and North Korea, all of which are declared, or assumed to be, nuclear powers.

²⁸ See Blum, 49 Harv J Int L at 352–54 (cited in note 20); Paul B. Stephan, *Revisiting the Incorporation Debate: The Role of Domestic Political Structure*, 31 Va J Int L 417, 421–22 (1991).

These factors allow states a high degree of selectivity in what rules of international law they will recognize. Consider a cluster of treaties to which most states belong, the four 1949 Geneva Conventions on international humanitarian law.²⁹ One might think that the evolution of decades of practice by dozens of the countries under these Conventions would have led to consensus on most, if not all, salient issues. But fierce debates still rage. As I indicated above, the US government takes the position that persons who participate or support armed attacks but do not belong to regular militias, as defined by the Prisoner of War Convention, do not enjoy the privileges normally extended to combatants under the Conventions and the customary law of armed conflict. Others insist that there is no such thing as an “unlawful combatant” under international law and that those persons who do not enjoy combatant privilege are simply civilians. Some of the authorities who adhere to the civilian-only position believe that the law of war forbids the deliberate targeting of civilians in nearly all circumstances, but the Israeli Supreme Court disagrees.³⁰

The implications of these disputes are profound. Is it permissible to use military resources, including the mechanisms of military justice, to deal with terrorists? Can governments legally kill terrorists to thwart an attack, and if so, how imminent must the attack be? What legal standards apply to justify the capture and detention of terrorists? Is the rendering of support to a terrorist organization a war crime or only a local criminal offense, subject to normal rules regarding the limits of a state’s prescriptive jurisdiction? Working within the conventional tools and principles of international law, including the customary law of treaty interpretation, a conscientious adviser can come up with multiple and conflicting answers to all of these questions.³¹

²⁹ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), 6 UST 3114 (1956); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (1949), 6 UST 3217 (1956); Geneva Convention (III) Relative to the Treatment of Prisoners of War (1949), 6 UST 3316 (1956); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (1949), 6 UST 3516 (1956).

³⁰ See authorities cited in notes 14–16.

³¹ Also noteworthy is the second-order debate between the US government and European legal academics working under the auspices of the International Committee of the Red Cross over the proper methodology for establishing rules of customary international law. Compare Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge 2005), with Letter from John Bellinger III, Legal Adviser, US Dept of State, and Jim Haynes II, General Counsel, US Dept of Defense, to Dr. Jakob Kellenberger, President, Intl Comm of the Red Cross (Nov 3, 2006), in Sally J. Cummins, ed, *Digest of United States Practice in International Law* 1069–85 (2007), and W. Hays Parks, *The ICRC Customary Law Study: A Preliminary Assessment*, 99 Am Soc’y Intl L Proc 208, 208–11 (2005).

The unlawful combatant example is especially salient, but hardly the only instance of fundamental disagreement among responsible actors about the content of international law. Does international law employ a concept of *jus cogens*, that is to say a body of rules that apply without regard to state consent? The Vienna Convention on the Law of Treaties ("VCLT") endorses this proposition, as does the American Law Institute's Restatement of the Law of Foreign Relations of the United States.³² Most academic international law specialists take the existence of *jus cogens* as a given, and the European Community's Court of First Instance expressly endorsed the concept.³³ But adherence to the VCLT is far from universal, and in particular does not include the United States. Moreover, US courts and the US government seem equivocal about whether this category of international law exists, as well as what its content might be.³⁴

To consider another fundamental question, what is the content of the customary international law governing prescriptive jurisdiction, that is to say the authority of a state to regulate persons and conduct? Traditionally, territory and citizenship have served as the bedrock of the authority to prescribe rules. Collaterally, many states for decades resisted the assertion by the United States of its right to regulate extraterritorial conduct by noncitizens that has a direct and intentional effect on persons and things within its territory.³⁵ More recently, many academics and a few European states seem to have reversed direction by asserting that universal jurisdiction (which does not require any domestic effect at all) exists for states to punish certain human rights violations, independent of any treaty authority.³⁶ The US government appears to disagree with these non-

³² Vienna Convention on the Law of Treaties, art 54; Third Restatement § 331(2)(b) & cmt e (1987) (cited in note 26).

³³ *Kadi v Council*, Case T-315/01, 2005 ECR II-3649 (Sep 21, 2005) (upholding Council Regulation No 467/2001, but considering *jus cogens* attack), reversed, *Kadi & Al Barakaat Intl Found v Council & Comm*, Joined Cases C-402/05, C-415/05, 3 CMLR 41 (2008).

³⁴ See, for example, *Belhas v Ya'alon*, 515 F3d 1279, 1288 (DC Cir 2008) (rejecting implied *jus cogens* exception to foreign sovereign immunity); *United States v Yousef*, 327 F3d 56, 94–96 (2d Cir 2003) (limiting scope of *jus cogens* claims); *Smith v Socialist People's Libyan Arab Jamahiriya*, 101 F3d 239, 244 (2d Cir 1996) (rejecting implied waiver of foreign sovereign immunity based on *jus cogens* violation); *Prince v Federal Republic of Germany*, 26 F3d 1166 (DC Cir 1994) (rejecting implied waiver of foreign sovereign immunity based on *jus cogens* violation); *Committee of US Citizens v Reagan*, 859 F2d 929, 939–42 (DC Cir 1988) (rejecting argument that compliance with ICJ judgments was *jus cogens*).

³⁵ See, for example, Brief of Amicus Curiae the European Commission in Support of Neither Party, *Sosa v Alvarez-Machain*, No 03-339 (US Jan 23, 2004). See also Third Restatement § 403 (seeking to accommodate European objections to US assertion of prescriptive jurisdiction) (cited in note 26).

³⁶ For the view of the advocates, see, for example, Stephen Macedo & Mary Robinson, *The Princeton Principles on Universal Jurisdiction* 23–27 (Princeton 2001).

treaty claims about universal jurisdiction, although it continues to push the limits of the effects concept.³⁷

The point is that disagreement over the content of international law goes beyond debates about marginal issues that any legal system invites. Rather, as these examples indicate, no consensus exists about the basic architecture of the system. In the face of these conflicts, states opportunistically select both the first-order rules that impose obligations directly and the second-order rules that address how to select rules.

There is a tendency in international law scholarship to deplore, and to some extent disregard, selectivity by states in the recognition of international law.³⁸ These commentators insist that international law can provide only one answer to any particular question. A practice either complies with international law or it does not, no matter what level of disagreement about the applicable rule may exist.³⁹ This disposition is understandable but shortsighted. If international law is to function as a constraint on state behavior and a means of ordering social relations, it must submit to the kind of positive analysis that normally applies in the study of any legal system. When variation exists, scholars should try to determine why. Its manifestation should not be seen as illegitimate, any more than the variation in contract law among the many common law jurisdictions and several US states nullifies the concept of contract law as a meaningful legal system.

This Article's purpose is neither to condemn nor celebrate the selective acceptance of international law by various states. Many factors drive states towards a universalist or a selective approach. As the previous section of this paper argues, one of those factors, and an important one, is the configuration of state power in the international system.

³⁷ See, for example, *Sarei v Rio Tinto, PLC*, 550 F3d 822, 837-40 (9th Cir 2008) (Ikuta, J, dissenting); Brief of the United States as Amicus Curiae in Support of Petitioners, *American Isuzu Motors, Inc v Ntsebeza*, No 07-919, 12-16 (Feb 11, 2008).

³⁸ But see Blum, 49 Harv J Intl L 323 (cited in note 20).

³⁹ A related debate involves the "fragmentation" of international law. Compare International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.682 (Apr 13, 2006) (study authored by Professor Martti Koskenniemi seeking to impose a universalist superstructure), and Eyal Benvenisti and George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 Stan L Rev 595, 600-04 (2007) (deploring fragmentation as an impediment to democratic and egalitarian development of international law), with Tomer Broude, *Principles of Normative Integration and the Allocation of International Authority: The WTO, the Vienna Convention on the Law of Treaties, and the Rio Declaration*, 6 Loyola U Chi Intl L Rev ____ (forthcoming 2009), available online at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1249432> (visited Apr 17, 2009) (arguing that fragmentation is an inevitable product of power relations among international lawmakers and that defragmentation also implies power politics).

Put simply, a powerful state will seek to impose its own version of international law. If the international system contains multiple great powers, each will offer up a distinct and competing version of the subject. Symmetry in power promotes selectivity in international law. As a corollary, a single superpower will provide an exclusive vision, even if its claims face a critical response and calls for reform. Asymmetry in power promotes universality in international law. As a refinement, a system encompassing competing regional superpowers will see a coherent account of international law within each bloc accompanied by arguments attacking the validity of the opposing bloc's account.

These claims produce testable hypotheses. A necessary consequence of an increase in the competition among versions of international law is a growth of selectivity. Conversely, a turn toward universality in international law will accompany a state's consolidation of power. At the extreme, a single superpower will promote a single universal vision of international law. One can assess the extent of selectivity and universality both by examining the assertions of great powers about international law and by looking at the extent of their membership in international organizations and willingness to adhere to rules generated by those organizations.

In the next section this Article examines evidence of the relationship between great power competition and selectivity in international law. This review reflects casual empiricism rather than systematic quantitative analysis. Even so, the support for its hypothesis is fairly strong.

IV. THE EVIDENCE

This Article began with a highly simplistic account of international relations during the last sixty years: bipolar superpower competition gave way to US hegemony that in turn has receded as the rise of Russia, China and perhaps other developing-country great powers complemented Europe's independence as an international actor. Reality is, of course, messier. The bipolar competition went through several transformations, and, at the end of the day, waned rather than collapsed. US hegemony during the 1990s was incomplete and oversold. The outline of the new system of great power competition that may have emerged in the twenty-first century is far from clear, and in any event the United States remains the one essential power.

Yet the arc of the story reflects certain fundamental realities. Shortly after the end of World War II, the Soviet Union and the United States began a rivalry, often dangerous and sometimes violent, that pervaded international relations. This rivalry dictated not only the shape of international institutions, but also core theories about the content and functions of international law. At the end of the 1980s, the Soviet Union became undone and most of its hegemonic relations, especially with the states of Central and Eastern Europe, unwound. It seemed by

1991 that only the United States functioned as a superpower with the capacity to impose its will on other states. An explosion of new international institution building occurred, some universal and others regional. At the turn of the century, new tensions between Europe and the United States manifested themselves. The armed attack of al Qaeda on the United States and the US-led invasion of Iraq exposed deep international insecurities and conflicts. During this time the larger states of the developing world—Brazil, China, India and Russia—emerged as economic, and potentially geopolitical, powers whose interests did not necessarily align with those of the United States and whose capacity to push back had grown. Most recently, a global financial crisis now augers a major reconfiguration of state power and interests. It is, of course, too early to predict with any confidence what this reconfiguration will produce. But, if nothing else, the heady optimism and unchallenged US authority of the 1990s seem to have ended.

The symmetry-asymmetry structure fits nicely onto these events. For much of the period between 1945 and 1985, Soviet-US relations reflected (relative) symmetry at the same time that each superpower enjoyed asymmetrical relations with the other states in its bloc. The brief era of US dominance exemplifies general asymmetry, even if observers disagree about the degree and scope of hegemony. What now is emerging remains contingent and obscure, but the evidence of growth in symmetrical great power competition seems clear enough. During these periods, international law has oscillated, and continues to oscillate, in its universality and selectivity consistently with my hypothesis.

A. INTERNATIONAL LAW DURING THE COLD WAR

Mainstream international law scholars tend to focus on two universalist moments at the end of World War II, namely the creation of the United Nations and the institution of the International Military Tribunal to try Nazi war crimes. But events quickly overtook these heady products of postwar idealism and marginalized the institutions that they embodied. For most of the next forty years, selectivity in international law dominated the field.

First, notwithstanding the nods toward universalism at Turtle Bay and Nuremberg, the development of international organizations during the Cold War period was highly selective. Prosecution of Japanese war crimes took place without any significant participation by the erstwhile allies of the United States.⁴⁰ The Soviet Union, although a signatory to the 1944 Bretton Woods Agreements, refused to ratify those treaties and thus stayed out of the World Bank and the

⁴⁰ See Allison Marston Danner, *Beyond the Geneva Conventions: Lessons from the Tokyo Tribunal in Prosecuting War and Terrorism*, 46 Va J Intl L 83, 85–87 (2005).

International Monetary Fund ("IMF"). The General Agreement on Tariffs and Trade ("GATT"), signed in 1947, encompassed no states within the Soviet orbit.⁴¹ The North Atlantic Treaty Organization ("NATO") and the Council of Europe emerged as clubs of US allies; the Warsaw Pact and Comecon served the same purpose for the Soviet bloc.⁴²

During this period, those international organizations with near-universal membership exercised little authority. With the prominent exception of the Korean War, the UN Security Council took almost no concrete steps regarding the many armed conflicts of the day. The Soviet Union and China refused to accept the compulsory jurisdiction of the ICJ, and France and the United States ultimately withdrew their consent. The International Labor Organization similarly was moribund.⁴³ Such successes in superpower cooperation as took place—arms control deserves a prominent mention—rested on bilateral negotiations rather than any international organization.

I do not mean to suggest either that universalist international organizations did no work during this period or that states did not develop any universalist international law. The 1968 Nuclear Nonproliferation Treaty created a regime of great interest to both superpowers and obtained widespread, although not universal, membership. The International Telecommunications Union, a specialized agency of the United Nations created in 1947, functioned successfully as a means of assigning control over telecommunications frequencies of international significance. These isolated examples, however, do not obscure the general pattern of moribund universalist international organizations and robust selective international organizations.

Selectivity also infused debates about general international law. A sharp divide existed both as to the content of this body of norms and the methodology that could ascertain this content. The result was two coherent systems of international law operating largely at cross purposes and antagonistic to each other.

At the most fundamental level, authorities in the two superpowers disagreed about how to determine international law. In the West, the traditional

⁴¹ Subsequent to the signing of the General Agreement, several of the original parties, including Czechoslovakia, China, and Cuba, underwent a regime change and stopped participating in the system established by the Agreement. Subsequent regime changes brought the Czech Republic, Slovakia, and the People's Republic of China back into the fold, reconstituted by then as the World Trade Organization.

⁴² For discussion of international organizations during this period, see Paul B. Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U Colo L Rev 1555, 1571–75 (1999).

⁴³ Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 Vand L Rev 649, 690–704 (2006).

formula of consistent state practice induced by a sense of legal obligation sufficed, even though disagreement existed about how to apply each of these terms. Soviet scholars, however, developed a profoundly different approach.⁴⁴ Superseding the pre-World War II Soviet position that international law as such did not exist because revolutionary states had not participated in its formation, the new line maintained that the principle of peaceful coexistence provided the foundation for all international relations and the legal rules that maintained this order. Peaceful coexistence was not a permanent state, but rather the means to preserve international peace and harmony until the historically inevitable triumph of global socialism came about. The principle did not prescribe much in the way of specific rules, but did assign to the socialist camp an indefeasible right to reject any principle or norm of international law that did not correspond to the camp's objectives.⁴⁵ Armed with this tool, Soviet officials disputed the meaning of treaties even as they ratified them and categorically rejected particular customary claims, further deepening the selectivity of the opposing systems of international law.⁴⁶

Confronted with Soviet claims over the ownership of international law, states in the West responded by developing their own specialized systems of international obligations.⁴⁷ Although a variety of alliances emerged during this period, the most important involved Europe. There, bloc coherence rested first on the Council of Europe and its human rights agenda, and subsequently on the European Communities. The European Convention on Human Rights ("ECHR") and the Treaties of Rome provided the foundation for a new system

⁴⁴ See Nikita S. Khrushchev, *On Peaceful Coexistence*, 38 Foreign Aff 3 (1959). The most prominent work synthesizing post-war Soviet views of international law was G. I. Tunkin, ed, Проблемы международного права [Problems of International Law] (Иностранная Литература [Foreign Literature] 1961).

⁴⁵ See Paul B. Stephan, *The Cold War and Soviet Law*, 93 Am Socy Intl L Proc 43, 46-47 (1999); Leon Lipson, *Peaceful Coexistence*, 29 L & Contemp Probs 871, 880 (1964).

⁴⁶ For a discussion of these issues at the end of the Cold War by Soviet and US officials responsible for legal policy and national security, see Boris M. Klimenko and Paul B. Stephan, eds, *International Law and International Security: Military and Political Dimensions: A US-Soviet Dialogue* (M.E. Sharpe 1991) (published in the Soviet Union as Международное право и международная безопасность – Диалог советских и американских экспертов (Международные отношения [International Relations] 1991)).

⁴⁷ Building on the North Atlantic Treaty Organization model, the United States brought about other international organizations based on regional military alliances, including the Central Treaty Organization and the Southeast Asia Treaty Organization. These organizations did not survive the 1970s.

of international law that promoted continental cooperation and development on an unambiguously selective basis.⁴⁸

Differences between the two systems of general international law involved matters of substance as well as the rules determining what constitutes a legally binding custom. As to substance, consider the question of duties owed by a host country to foreign investors. Since the nineteenth century, capital-exporting states had insisted that customary international law recognizes an obligation not to expropriate the property of an alien except for a public purpose, without discrimination and with prompt, adequate and effective compensation. Capital importing states, and later the Soviet Union and its allies, rejected this position. Writing in 1964, the US Supreme Court characterized the question as one that sharply divided the international community and thus lacked the characteristics of a judicially enforceable obligations: "It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations."⁴⁹ Congress in turn endorsed the norm condemning uncompensated expropriation, demanding that US courts enforce the norm even in the face of divided international opinion.⁵⁰

To summarize, the period of bipolar power politics coincided with weak universal international organizations, substantial growth of international organizations within each hegemon's sphere of influence, and no universal consensus on fundamental issues of customary international law. Across the superpower divide, recognition of rules of international law was highly selective. Within each hegemon's camp, something more like universality emerged.

B. INTERNATIONAL LAW DURING THE PAX AMERICANA

At the end of the 1980s, the Soviet bloc broke up and Russia, stripped of the satellite republics that made up the Soviet Union, descended into political and economic turmoil. For roughly a decade, the United States seemed to be the sole superpower, unrivaled in its military and economic power. During this time one talked of a "Washington consensus" that focused largely on economic policy but also assumed a universal model for good political governance. Criticism of liberal democracy and markets as universal institutions never

⁴⁸ See Convention for the Protection of Human Rights and Fundamental Freedoms (1950), 213 UN Treaty Ser 221; Convention Relating to Certain Institutions Common to the European Communities (1957), 298 UN Treaty Ser 267.

⁴⁹ *Banco Nacional de Cuba v Sabbatino*, 376 US 398, 430 (1964).

⁵⁰ Foreign Assistance Act, Pub L 88-633, pt III, § 301(d)(4), 78 Stat 1013 (Oct 7, 1967), codified at 22 USC § 2370(e)(2) (2000).

disappeared, but their critiques seemed marginal and had no immediate effect on policymaking.⁵¹

A turn toward universalism in international law accompanied these events. This trend had three aspects—a growth in the responsibilities and scope of international organizations, the proliferation of legal claims about international human rights as a broad foundation for international relations, and an increased commitment to economic liberalization. As projections of US values and interests, each of these trends bolstered the soft hegemony of the United States.

Consider the renewal of international organizations after the end of the Cold War. For the first time since the founding of the United Nations, the Security Council, acting with full Permanent Member support, authorized an armed intervention, specifically to repel Iraq's invasion of Kuwait.⁵² The US-led coalition famously refused to exceed the Security Council's mandate by moving the fight into Iraq and overthrowing the Iraqi dictator. The former Soviet allies and the European components of the former Soviet Union, including Russia, signed on to the ECHR. The Bretton Woods organizations absorbed most of the members of the former Soviet bloc. The GATT, reconstituted as the WTO in 1994, also expanded its reach to include most of the former socialist states, although Russia remained (and still remains) outside the organization.⁵³ The US Treasury and the IMF worked in tandem to manage economic crises in Mexico (1994), East Asia (1997) and Russia (1998).⁵⁴

Greater recognition of human rights protection as a fundamental function of international law accompanied these institutional changes. This strand of international law advocacy has, of course, earlier roots, extending through the Nuremberg trials back to the campaign against Belgium's atrocities in the Congo. The incorporation of human rights provisions in the 1975 Helsinki Final Act brought this topic into the orbit of superpower conflict. In the wake of the Final Act, the United States and its allies, on the one hand, and the Soviet Union, on the other, articulated profoundly different conceptions of both the content of human rights law and the rules for the recognition and enforcement of these rights.⁵⁵ During the 1980s, the field emerged in the West as a legacy of

⁵¹ For my contemporary skepticism of the prevailing wisdom, see Paul B. Stephan, *The Fall—Understanding the Collapse of the Soviet System*, 29 Suffolk U L Rev 17 (1995).

⁵² Earlier, the Security Council had authorized armed intervention in Korea, but not with Soviet support. Rather than vetoing the Security Council resolutions, the Soviet Union simply refused to participate in the proceedings. UN Security Council Res. 82, UN Doc S/RES/82 (1950).

⁵³ See Stephan, 70 U Colo L Rev at 1576–78 (cited in note 42).

⁵⁴ For discussion and criticism of these interventions, see Joseph E. Stiglitz, *Globalization and Its Discontents* 89–166 (W.W. Norton 2002).

⁵⁵ Consider William Korey, *The Promises We Keep: Human Rights, the Helsinki Process, and American Foreign Policy* (St. Martin's 1993).

the Carter Administration's effort to reorient US foreign policy and thus as a mode of critiquing the Reagan Administration's subsequent approach. During this period many states adopted various human rights treaties sponsored by agencies of the United Nations, but these instruments did little to affect state behavior and may even have enabled some repressive regimes to worsen their conduct.⁵⁶ On balance, the emergence of anything like an international consensus about the centrality of human rights in international law did not occur until the bipolar competition ended.

Several factors contributed to the universalization of international human rights ("IHR") during the early 1990s. First, assertions about IHR became the basis for an internal critique by the former socialist states of their immediate past. Second, these assertions also became a basis for the incorporation of these former states into the European mainstream. The most concrete step in this process was the nearly automatic assumption by the former members of the Soviet bloc of the obligations imposed by the ECHR. Third, the end of the Soviet threat destabilized regimes that had based their legitimacy on either their adherence to the Soviet model (think of Nicaragua) or their anticommunism (think of the apartheid rulers of South Africa and the Pinochet junta in Chile). In each case, the transition opened up opportunities to invoke IHR as a means of providing legitimacy to the successor regimes.

At least as important for universalization was the clear interest of the United States in using IHR as a way of providing a normative basis for its suddenly enormous international influence, complemented by the lack of a clear interest on the part of China, Europe, Japan or Russia in resisting the United States' IHR narrative. Europe, with its Convention as part of its constitutional identity, saw itself as a partner of the United States in the IHR project. Russia, as noted above, used IHR as a means of stigmatizing its immediate past and thus defending its new leadership. Japan found itself mired in a prolonged economic crisis that distracted it from significant international projects, while China quietly refused to engage on IHR issues while seeking to rehabilitate its image in the wake of the 1989 Tiananmen Square incident.

One manifestation of the universalization of IHR during the 1990s was its role in justifying international intervention as a response to various crises. The 1990 Gulf War was the last international conflict to rest on the core international law principle of inviolability of borders and the corresponding obligation to punish an invader.⁵⁷ Henceforth, IHR became the basis for concerted

⁵⁶ See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 Yale L J 1935, 1989–2002 (2002).

⁵⁷ More recently, Russia in August 2008 invoked this principle to justify its expulsion of Georgian armed forces from South Ossetia. However, neither the United Nations nor some other broad

international action. Early on, the United Nations supported international efforts to halt the Yugoslav civil war, and, in the spring of 1993, it created a special tribunal to prosecute violations of IHR arising from that conflict.⁵⁸ This institution was the first universalist international criminal court since Nuremberg. International intervention in Rwanda, belated as it was, responded to massive human rights violations and also resulted in the Security Council's creation of a tribunal to vindicate IHR.⁵⁹ Operation Uphold Democracy, the US invasion of Haiti to oust its military dictatorship and to install Jean-Bertrand Aristide as President, had as its goal the "restoration of democracy" rather than any traditional security interest.⁶⁰ In each of these instances, as well as in several less-well publicized incidents, the universalist organs of the United Nations supported armed intervention in support of IHR.⁶¹

Proponents of IHR responded to this general success with ambitious claims for even greater influence. On the one hand, they joined IHR to the customary international law concept of *jus cogens* to argue that at least "core" IHR was binding on all states independent of consent and without the possibility of derogation. On the other hand, they argued that customary international law now recognized a concept of "universal jurisdiction" that allowed all states to sanction violations of core IHR without the need to satisfy conventional jurisdictional requirements such as territoriality or citizenship. Although these claims met, and continue to meet, resistance, their very assertion indicates the growth in prestige and influence of IHR during this period.

As noted above, a broad and general commitment to economic liberalism complemented the expansion of IHR claims. The most obvious manifestation of this trend was the deepening and extending of the European Community and the creation of the WTO. The WTO in particular, although it excluded China and Saudi Arabia for the entire decade and still does not include Russia, otherwise embraced many of the most important economies. With the Uruguay Round Agreements of 1994, it moved beyond its traditional task of tariff discipline to pursue liberalization of trade in services, capital movements, and

configuration of states accepted this assertion. The issue is complex, inasmuch as Georgia technically exercises sovereignty over the area but also has an obligation not to interfere with the internationally authorized peacekeeping mission carried out there by Russian forces.

⁵⁸ Security Council Res No 827, UN Doc S/RES/827 (1993).

⁵⁹ Security Council Res No 912, UN Doc S/RES/912 (1994); Security Council Res No 955, UN Doc S/RES/955 (1994).

⁶⁰ Security Council Res No 940, UN Doc S/RES/940 (1994).

⁶¹ See Security Council Res No 1246, UN Doc S/RES/1246 (1999) (establishing UN Mission in East Timor); Security Council Res No 1181, UN Doc S/RES/1181 (1998) (establishing UN Observer Mission in Sierra Leone); Security Council Res No 858, UN Doc S/RES/858 (1993) (establishing UN Observer Mission in Georgia).

intellectual property protection. Meanwhile, the World Bank and the IMF increasingly took on the management of developing country economies, for the most part promoting integration in the global economy, reduction of the public sector, and transparent financial markets. China and India, two important states that did not accept the tutelage of the Bretton Woods institutions, still pursued economic reforms throughout the decade that largely reinforced the liberal trend. In addition, many developing countries, as well as most of the former socialist countries, entered into bilateral investment treaties during this period to signal their commitment to the property rights of foreign investors.⁶²

In short, the 1990s' brief flourishing of unopposed US international power did not amount to either complete US hegemony or a full universalization of international law. But still, a single superpower did dominate international relations. As a consequence, to a far greater extent than in the previous decades, most of the world's states accepted common treaty obligations and basic conceptions about the structure and content of international law.

C. NEW PATTERNS IN WORLD ORDER AND INTERNATIONAL LAW

It is not easy to pinpoint when the United States began to lose its soft hegemony. Some of the most important developments leading to the contemporary multipolar structure of international relations, especially the extraordinary economic growth of Brazil, China and India, occurred outside the realm of conventional power politics. Particularly salient were the 9/11 terrorist attacks, the moment when US vulnerability impressed itself on popular consciousness. But signs that US power had come up against hard constraints appeared even earlier.

One early indicator of trouble was the heavy reliance of the United States, as well as US debtors, on foreign creditors, especially in East Asia.⁶³ Although this inflow of capital was seen at the time more as evidence of US productivity than of profligacy, the present financial crisis puts a new perspective on this fundamental economic weakness. Another set of indicators were the successful terrorist attacks on US embassies and military installations, which turned out to

⁶² See Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 Va J Int'l L 639, 651–53 (1998).

⁶³ See Niall Ferguson & Moritz Schularick, "Chimerica" and the Global Asset Market Boom, 10 Int'l Fin 215, 227–29 (2007). US government debt held by foreign creditors grew sharply in the mid-1990s, up by 28 percent in 1995 alone, and then rose steadily thereafter. It increased 120 percent from the end of 1992 to the end of 2000, and 160 percent from the end of 2000 to the end of 2007. See US Department of Commerce, Bureau of Economic Analysis, *International Investment Position of the United States at Year End*, available online at <http://www.bea.gov/international/xls/intinv07_t2.xls> (visited Apr 17, 2009).

be the onset of al Qaeda's campaign against the United States. Still another turning point might have been the 1999 Kosovo air war. On the surface this event seemed a clear manifestation of US supreme power, humbling as it did a strong Russian ally and producing no immediate consequences for the destruction of the Chinese embassy. But the US-led campaign also exposed clearly divergent interests between the United States, on the one hand, and China and Russia, on the other, and created grievances that would feed later conflicts.

The Bush Administration came to power manifesting a distinct indifference to diplomatic niceties. This simmering stew of resistance and conflict came to a boil after the 9/11 catastrophe. The United States saw itself as the victim of an unprovoked and barbaric attack. Elsewhere, popular sentiment seemed to see the attack as barbaric but not wholly unprovoked. In Europe in particular, many feared that a violent and excessive reaction by the United States would inflame the Islamic world, especially the Islamic immigrant communities residing in Europe. The attack on al Qaeda and its supporters in Afghanistan seemed to confirm these fears. The Bush Administration's subsequent decisions to detain at Guantanamo unlawful combatants captured in Afghanistan and elsewhere, to employ military commissions to try these persons for war crimes, and to "unsign" the Rome Statute, all reinforced the belief that the United States had overreacted to the terrorist threat.⁶⁴

The 2003 invasion of Iraq laid bare the extent of international resistance to US hegemony. Many NATO members participated in the invasion, but for the most part their electorates vehemently protested and in some cases overturned the governments that had agreed to the US mission. France and Germany loudly and prominently attacked the invasion; China, India and Russia also withheld their support. As the successful invasion morphed into a disastrous occupation, much of the world came to see the United States as not only arrogant but incompetent and increasingly impotent. Revelations of prisoner abuse in Abu Ghraib, coupled with exposure of government deliberations on the legality of torture, rounded out an image of the United States as dangerous, brutal, and

⁶⁴ As to the detention of suspected unlawful combatants and the prospect of imposing punishment through military tribunals rather than either courts martial or the regular courts, the resulting firestorm is notorious and engendered the hostility of much of Europe and the developing world as well as the Supreme Court. As to the repudiation of the Rome Statute, the US administration defended the withdrawal of its signature as a necessary step under international law. It wished to pressure other states to promise not to bring charges against US military personnel deployed in future peacekeeping operations, and saw this pressure as inconsistent with a treaty signatory's customary international legal obligation not to take actions inconsistent with the object and purpose of that treaty. Critics saw these arguments as a futile attempt to conceal a broad contempt for international law. See, for example, Harold H. Koh, *On American Exceptionalism*, 55 *Stan L Rev* 1479, 1507 (2003).

fundamentally weak. The Russian response to Georgia's military actions in South Ossetia seemed to provide the exclamation point: the United States could not protect one of its most loyal allies from an armed invasion.

Other grave challenges to US power emerged in the early years of the twenty-first century. North Korea revealed that it had acquired nuclear weapons, while India consolidated its status as a nuclear power, and Pakistan went to the brink of a direct nuclear exchange with India. The coalition assembled to invade and occupy Iraq crumbled in the face of resistance and, in the case of Spain, domestic terrorism. The run up of energy prices empowered Russia, which asserted its influence, among other ways, by threatening European gas supplies. Also buoyed by a shift in the terms of trade in favor of primary product exporters, populist governments in Latin America repudiated the Washington consensus and liberal economic principles more generally. Then, in 2007, came the financial crisis, the scope and consequences of which are, as of this writing, unknown. We cannot tell what the future will bring, but the era of the *Pax Americana* seems finished.

Generalizing with any degree of confidence about this new period in international relations is very difficult, other than observing the clear break with the immediate past. Although considerably weakened, the United States remains an important power. Whether the new international system will develop into the kind of great power concert that characterized the latter part of the nineteenth century and the first decade of the twentieth, or instead a less-stable kind of international anarchy, remains anyone's guess. To paraphrase Yeats, the new beast aborning in international structure has not yet revealed itself to us.

For purposes of this Article, however, it suffices to observe that the system of international relations has changed and that the evident hegemony of the United States has diminished, even if it has not disappeared. International relations have become more symmetrical, even if we see nothing like the symmetry reflected in the strong bipolar system of the Cold War era. It thus becomes possible to test the claim that with greater symmetry in international relations comes greater selectivity in international law.

One indicator of the extent of universalism in international law is reliance on Security Council consensus for armed intervention. The Kosovo air war did not enjoy Security Council endorsement, requiring proponents of that war to develop new and controversial theories about the legality of armed intervention. The United States claimed that NATO endorsement substituted for Security Council approval, while the United Kingdom articulated the beginnings of a theory of humanitarian intervention. Neither China nor Russia accepted either argument. Then, in 2002–03, an even stronger disagreement arose between the

United Kingdom and the United States, on the one hand, and the other Permanent Members of the Security Council, on the other, as to the meaning and purpose of the existing resolutions concerning Iraq.⁶⁵ No new resolution was produced that would explicitly authorize the planned invasion. As a result, the UN Security Council lost the control over the use of force that it appeared to enjoy during the first part of the 1990s.⁶⁶

At the end of the 1990s, there emerged a general trend of multilateral projects proceeding without the United States. President Clinton, the Senate, or both, opposed the Kyoto Protocol on global warming, the Rome Statute on the International Criminal Court, the Comprehensive Test Ban Treaty, and the Land Mine Convention. Some of these multilateral projects reflected a desire to rein in US power, while others sought simply to redirect US influence to subjects of lesser interest to Washington.⁶⁷ Each, however, indicated a rise in selectivity in international law.

Another contemporaneous skirmish between the United States and the rest of the world involved the death penalty. The United States, like China, India, Japan and Russia, retains capital punishment (although Russia has applied a moratorium). Europe, along with much of Latin America and Africa, disavows this sanction. In 1998, a Paraguayan national sought to use the ICJ to prevent his execution by Virginia for murder. The police had not told him at the time of his arrest that he could contact Paraguay's consulate in the United States to seek help. This failure to notify violated the Vienna Convention on Consular Relations. The violation, the Paraguayan argued, invalidated his capital sentence. The ICJ requested that the United States not carry out the sentence while it considered the matter. The Clinton Administration responded that it had no legal authority to intervene in the case, notwithstanding the treaty violation, but it did ask Virginia's Governor to delay the execution. The Supreme Court agreed with the Clinton Administration that the federal government had no basis to intervene in the criminal proceedings, and Virginia, ignoring the Administration's request for a delay, put the Paraguayan to death.⁶⁸ The ICJ then dropped the case, but an international outcry ensued.⁶⁹ This episode, and the

⁶⁵ For a Chinese critique of the US argument, see Hongqiao He and Wensheng Qu, *The Illegitimacy of the War against Iraq under International Law*, 3 J Luohe Voc & Tech Coll 68 (2004).

⁶⁶ See Michael J. Glennon, *The UN Security Council in a Unipolar World*, 44 Va J Intl L 91, 94–101 (2003). Consider Michael J. Glennon, *The Rise and Fall of the U.N. Charter's Use of Force Rules*, 27 Hastings Intl & Comp L Rev 497 (2004).

⁶⁷ See Paul B. Stephan, *US Constitutionalism and International Law: What the Multilateralist Move Leaves Out*, 2 J Intl Crim Just 11, 12 (2004).

⁶⁸ *Breard v Greene*, 523 US 371, 377–79 (1998).

⁶⁹ See, for example, Jonathan I. Charney and W. Michael Reisman, *Agora: Breard*, 92 Am J Intl L 666 (1998).

several that followed involving the same treaties and the same underlying issue of executing aliens, marked a rupture between the United States and the universalist ICJ.

Other, less publicized events also point to a rise in selectivity in the international order. The pact through which the United States legitimated India's acquisition of nuclear weapons represented a fundamental break with the collective hard line of the legacy nuclear powers against proliferation.⁷⁰ The Doha Round of trade negotiations collapsed, and the European Union's effort to reconstitute itself came to a grinding halt. Several Latin American states repudiated their treaty obligations to submit investment disputes to binding arbitration. Each of these steps represented a move away from general international law obligations.

Another sign of retrenchment of international organizations and a corresponding reduced commitment to universalism is the failure to devise an appropriate architecture to deal with the current financial crisis. The problem is fundamentally international, resting as it does on cross-border sales of interests in overvalued assets and the resulting insolvency of financial institutions. Local political interests have led to actions that aggravate the problem. Some governments, for example, have protected local institutions in a manner that puts greater pressure on the international financial system. The gap between the nature of the problem and the structure of the response remains both remarkable and disturbing.

Claims about background norms of international law provide even stronger evidence of a rise in selectivity since the late 1990s. Much of the great power dissensus over treaty interpretation and background norms involves the United States and Europe, especially regarding IHR and terrorism. Broadly speaking, European specialists see human rights commitments as a means of disarming a largely domestic threat, while the United States sees the law of IHR as unacceptably constraining its actions against a foreign enemy. At a lower level of abstraction, most European international law specialists regard the ECHR as a template for the progressive development of customary norms for state behavior, even as they accept the technical point that this treaty binds only its signatories. Thus they deplore the refusal of the United States to regard the general IHR law embraced by the ECHR as applicable to its activities in Afghanistan and Iraq as well to Guantanamo. Relatedly, they object as well to the US position on the territorial scope of the International Covenant on Civil

⁷⁰ See Henry J. Hyde United States–India Peaceful Atomic Energy Cooperation Act of 2006, Pub L No 109-401, 120 Stat 2726, codified at 22 USC § 8001 et seq (2008).

and Political Rights, which complements the ECHR.⁷¹ In addition, European specialists reject the US position that the laws of war permit the use of military tribunals to punish unlawful combatants.⁷² Ongoing criminal proceedings in Germany, Italy and Spain—targeted at US intelligence and military officials—highlight both the size of the divide between the powers and the divergence in understanding of what international obligations apply.⁷³

The arguments between the United States and Europe, however, should not obscure other conflicts involving the other great powers. In 2007, Russia suspended its participation in the Treaty on Conventional Forces in Europe.⁷⁴ It also has chosen to recognize Abkhazia and South Ossetia as sovereign states, a decision only Nicaragua, its one-time dependent, has followed. Symmetrically, the United States and some of the European states have recognized Kosovo as a state in the face of vehement Russian objections. As noted above, Chinese specialists have published vehement attacks on the US approach to the law of armed intervention. India's courts have developed idiosyncratic interpretations of various international environmental declarations as a basis for challenging various development projects, and implicitly as a critique of the Washington

⁷¹ Article 1 of the ECHR applies to all persons “within the jurisdiction” of a signatory state. The House of Lords has interpreted this language as including persons detained by British military forces in Iraq, but not as embracing Iraqi nationals killed or injured during armed conflict. *R v Secretary of State for Defence*, [2007] All ER (D) 106 (HL 2007). See also *Markovic v Italy*, [2006] ECtHR 1398/03 (Italy has an obligation under ECHR to consider claims for damages by victims of NATO bombing in Serbia); *Bankovic v Belgium*, 2001-XII ECtHR 335, 353 (Convention does not create substantive rights as to victims of NATO bombing). As for the International Covenant on Civil and Political Rights, its Article 2(1) binds states with respect to “all individuals within its territory and subject to its jurisdiction.” International Covenant on Civil and Political Rights (1966), 999 UN Treaty Ser 171 (emphasis added). At the time of negotiation of this instrument, the United States insisted on a conjunctive jurisdictional limitation so as not to have the Covenant apply to its actions as an occupying power in the wake of World War II. Many European countries, however, regard the “and” as meaning “or” and insist that this interpretation had ripened into a binding rule by the time the United States joined the Covenant in 1992. Under the US interpretation, the Covenant does not apply to Guantanamo, unless “its territory” comprises the unique treaty relationship that applies there; it clearly does not apply to occupation activities in Afghanistan and Iraq. Under the European interpretation, the Covenant applies in all these instances.

⁷² See notes 15–16 and accompanying text.

⁷³ Scott Lyons, *German Criminal Complaint Against Donald Rumsfeld and Others*, ASIL Insights (Dec 14, 2006), available online at <<http://www.asil.org/insights061214.cfm>> (visited Apr 17, 2009); Frederic L. Kirgis, *Alleged CIA Kidnapping of Muslim Cleric in Italy*, ASIL Insights (July 7, 2005), available online at <<http://www.asil.org/insights050707.cfm>> (visited Apr 17, 2009); Adam Zagorin, *Charges Sought Against Rumsfeld Over Prison Abuse*, Time (Nov 10, 2006), available online at <<http://www.time.com/time/nation/article/0,8599,1557842,00.html>> (visited Apr 17, 2009).

⁷⁴ See *OSCE Chairman Calls for Renewed Efforts to Address CFE Treaty Concerns*, The Organization for Security and Co-operation in Europe (Jul 14, 2007), available online at <<http://www.osce.org/item/25608.html>> (visited Apr 17, 2009).

consensus.⁷⁵ In each case, a major power has made exceptional claims about the content of international law, moving away from universality.

A particularly vivid instance of the resurgence of selectivity in the recognition of international law is the refusal of the highest European and US judicial bodies to give effect to international obligations that interfere with fundamental elements of the domestic legal order. In each instance, the relevant executive (the President in the case of the United States, and the Commission in the case of the European Community) argued that universal international law, namely the UN Charter, justified certain actions, but the highest court applied an inconsistent local legal norm instead. In both cases, the judicial decision brought about a violation of international law. Much as the Soviet Union's theory of international law insisted on the necessity of a Soviet veto over international law formation, both of these court systems seem to assume the precedence of local interests over international obligation.

The US Supreme Court decision, *Medellin v Texas*, represents the culmination of a decade of litigation over the domestic effect of a particular treaty obligation, namely the duty not to execute foreign nationals who had not been told of their right to contact their home state's consulate in the course of criminal proceedings instituted against them.⁷⁶ *Medellin* confirmed what the Court had held a decade earlier: orders of the ICJ have no legal effect in the United States, even where the United States has accepted the jurisdiction of that tribunal in a dispute that results in such orders.⁷⁷

The European decision, *Kadi v Council*, similarly held that resolutions of the UN Security Council do not bind the organs of the European Community.⁷⁸ The

⁷⁵ See, for example, *Karnataka Industrial Areas Development Board v Sri C Kenchappa & Ors*, MANU/SC/8159/2006, ¶¶ 43–44. Consider Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 Am J Int'l L 241, 259–62 (2008).

⁷⁶ 128 S Ct 1346 (2008). For discussion of the litigation, see Paul B. Stephan, *Open Doors*, 13 Lewis & Clark L Rev 11 (2009); Curtis A. Bradley, *Agora: Medellin: Intent, Presumptions, and Non-Self-Executing Treaties*, 102 Am J Int'l L 540 (2008); Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 Harv L Rev 599 (2008).

⁷⁷ See notes 68–69 and accompanying text.

⁷⁸ *Kadi & Al Barakaat Intl Found v Council & Comm*, Joined Cases C-402/05, C-415/05, 3 CMLR 41 (2008). In an earlier case, the European Court of Justice ("ECJ") refused to give effect to a decision of the Law of the Sea Tribunal that supposedly bound Ireland and the United Kingdom, two members of the Community. *Commission v Ireland*, Case C-459/03, 2006 ECR I-4635 (2006). Subsequently, the ECJ barred national courts from issuing anti-suit injunctions as a means of enforcing the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *Allianz SpA v West Tankers Inc*, Case C-185/07, 2009 WLR (D) 44 (Feb 10, 2009). Most recently, the ECJ ruled that bilateral investment treaties into which a number of members have entered are inconsistent with EC law. *Commission v Austria & Sweden*, Joined Cases C-205/06, C-249/06, 2009 ECJ (Mar 3, 2009), available online at <<http://curia.europa.eu/en/transitpage.htm>> (visited Apr 25, 2009). The initial scholarly reaction to *Kadi*, as well as to the general trend of subordinating

Security Council resolution in question created a process to freeze funds used to support international terrorists.⁷⁹ The European Court of Justice determined that this mechanism did not provide adequate process to persons suspected of supporting international terrorism and therefore could not be implemented by the European Community. The human rights norms implicit in the treaties constituting the European Community trumped the Community's obligation to comply with the UN Charter.

Although *Medellin* dismays advocates of IHR while *Kadi* pleases them, as a structural matter the decisions are identical. Each represents a step away from universality, as embodied in the UN Charter. In particular, both are inconsistent with the conventional international law claim that the obligations of the UN Charter operate as peremptory norms that take precedence over inconsistent international rules.⁸⁰ Both regard international law as particular and contingent rather than as general and binding. Both reserve fundamental issues for local decisionmakers, rather than trusting the disparate actors who operate within the UN system. In other words, they manifest confidence in local institutional arrangements and suspicion of outside structures, even when the latter march under the flag of universal international legal obligation. Perhaps most importantly of all, both outcomes represent the considered opinion of the judiciary, and thus are more entrenched than the positions taken by the respective executive authorities.

My point is not to assess either decision as wise or pernicious. Rather, both reflect an emerging international order based on multipolarity. In an earlier time, divergent interests between the United States and its Western European allies were dwarfed by the common struggle with the Soviet bloc. Today, Western Europe has transformed itself into Europe, and significant security and economic interests divide the erstwhile allies where they once united them. It should not surprise us to see the lawmakers of the two great powers safeguarding their prerogatives rather than surrendering the authority to enact legal norms to bodies that purport to act on behalf of the entire international community.

treaty obligations to European law, has been positive. See Daniel Halberstam and Eric Stein, *The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*, 46 CMLR 13 (2009); Simon Chesterman, "I'll Take Manhattan": *The International Rule of Law and the United Nations Security Council*, 1 Hague J Rule of Law 67 (2009); P. Takis Tridimas and Jose A. Gutierrez-Fons, *EU Law, International Law and Economic Sanctions Against Terrorism: The Judiciary in Distress?* 32 Fordham Int'l LJ 660-730 (2009); Bronckers, 11 J Intl Econ L 885 (cited in note 24).

⁷⁹ Security Council Res No 1267, UN Doc S/RES/1267 (1999).

⁸⁰ See Third Restatement § 102 cmt h (cited in note 26).

V. CONCLUSION

This Article asserts and defends two broad claims. First, changes in the structure of international relations have a clearly observable effect on international law. Second, it is distracting to conceive of international law as a single universal body of rules and principles. To the contrary, selective acceptance of international law is a fundamental characteristic of the system. These claims intersect in my simple hypothesis: growth in symmetry in international relations leads to increased selectivity in international law.

A more granular study of international relations and international law might indicate both limitations and extensions of my simple hypothesis. In particular, the evidence I have adduced, while establishing a pattern that is broadly consistent with a rational-choice theory of international law rule formation, does not exclude other explanations for particular aspects of international law. What scholars have before us now is a wonderful (if terrible) natural experiment regarding international structure and legality. Adepts of the discipline need to use this opportunity to broaden our understanding of international law and the work it does, if only to strengthen arguments about the work that it should do.

